Sterne Kessler Goldstein Fox
ATTORNEYS AT LAW



# Fax

☐ Urgent ☐ Return reply requested ☐ Original will be sent as confirmation

To: **USPTO**

Date: April 3, 2008

Attention: Examiner

Re: Appl. No. 09/960,244; Filed 09/21/01
For: **Cell Populations Which Co-Express CD49c and CD90**
Inventors: HO *et al.*

From: Doyle A. Siever

U.S. Patent Application
Appl. No. 10/251,685; Filed: 9/20/ 02
For: **Cell Populations Which Co-Express CD49c and CD90**
Inventors: HO *et al.*

Pages (including cover sheet): 3

Fax No: 571-273-8300

Our Reference: 2560.0020001& 2560.0020000

# Message

Please see attached.

Certification of Facsimile Transmission

**I hereby certify that this paper is being facsimile transmitted to the Patent and Trademark Office on the date shown below.**

Name

**Date:** April 3, 2008

**please sign and return this page as acknowledgment of receipt**

803612_1.DOC

If any portion of this transmission is not received clearly or in full,
contact us at 202.371.2600 or f 202.371.2540

RECEIVED
CENTRAL FAX CENTER
APR 0 3 2008

# MEMORANDUM

TO: Examiner Leon Lankford &
Supervisory Patent Examiner Michael Wityshyn

FROM: Doyle Siever

DATE: April 3, 2008

RE: Interview Summary for:

U.S. Patent Application
Appl. No. 10/251,685; Filed: September 20, 2002
For: **Cell Populations Which Co-Express CD49c and CD90**
Inventors: HO *et al.*
Our Ref: 2560.0020001/JAG/D-S

U.S. Patent Application
Appl. No. 09/960,244; Filed: September 21, 2001
For: **Cell Populations Which Co-Express CD49c and CD90**
Inventors: HO *et al.*
Our Ref: 2560.0020000/JAG/D-S

ART UNIT: 1651

---

**Interview Summary:**

Representatives for the Applicants (Jorge Goldstein, Esq. and Doyle Siever, Esq.) met with Examiner Leon Lankford and Supervisory Patent Examiner Michael Wityshyn on April 3, 2008. Applicants' representatives wish to thank Messrs Lankford and Wityshyn for the courtesy of the interview.

The purpose of the interview was to discuss non-final rejections mailed Oct. 5, 2007, Applicants' reply to the same (including amendments, arguments, data, and an affidavit), and the currently pending claims in Applications 09/960,244 and 10/251,685. At the interview, the primary focus of the discussion centered on currently pending claim 14 in Application No. 09/960,244, since allowance of this claim is pertinent to allowance of additional claims in Applications 09/960,244 and 10/251,685.

Examiner Lankford expressed concern as to whether or not the limitations in claim 14 sufficiently distinguish Applicants' claimed cell population from certain prior art cell populations. Applicants maintained that the combination of claim limitations "wherein greater than about 91% of the cells of the cell population co-express CD49c and CD90, and wherein the cell population maintains a doubling rate of less than about 30 hours after 30 cell doublings" sufficiently distinguishes the presently claimed invention from the prior art. Applicants also pointed out that additional data, for example as described in affidavits submitted by Dr. Gene Kopen on May 18, 2007 and March 5, 2008, demonstrate that the isolated cell populations of the presently claimed invention express cell surface markers that are inherently distinct from prior art bone marrow-derived cell populations.

The Examiner stated that prior art cell populations might be able to switch expression of cell surface markers on and off (depending on cell culture conditions) and, therefore, some prior art cell populations might be able to express markers in common with Applicants' claimed cell populations. Applicants responded that since the prior art does not teach cell populations with the presently claimed phenotype (according to the above cited limitations), whether a function of the culture conditions or not, then claim 14 should be allowable. A consensus on this point was not reached.

The Examiner agreed, however, that a product-by-process claim, particularly one which incorporates a gradient fractionation process as described in Example 2 of the specification, would be a more likely route to obtaining allowable claims. The Examiner also agreed that if Applicants deposit a sample of the cell population of the invention and submit claims related to the deposit, this also is a more likely route to allowable claims. See, *In re Lundak*, 773 F.2d 1216 (Fed. Cir. 1985) and 37 C.F.R. § 801 *et seq.*

The Examiner agreed not to issue an office action in response to Applicants' previous reply if Applicants submit a Supplemental Response with new claims, as discussed above, within the next 6 weeks. Applicants' representatives agreed that they would discuss these suggestions with the applicant, and if applicant agrees, then new claims will be submitted in a Supplemental Response, without prejudice to pursuing the pending claims in the same or another application.

803590_1.DOC